

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.**

In the Matter of)	
)	
The Review of Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers.)	

**COMMENTS OF THE PUBLIC SERVICE
COMMISSION OF THE STATE OF MISSOURI**

The Public Service Commission of the State of Missouri (“MoPSC”) offers the following comments in response to the Federal Communication Commission’s (“Commission”) January 15, 2002 Public Notice (Notice) issued in the above docketed cases. On December 20, 2001, the Commission released a Notice of Proposed Rulemaking (NPRM) to initiate its first triennial review of the Commission’s unbundled network elements (UNEs).

Section 251(d)(2) of the Telecommunications Act of 1996 provides:

In determining what network elements should be made available for purposes of subsection [251](c)(3), the Commission shall consider, at a minimum, whether—

- (A) access to such network elements as are proprietary in nature is necessary; and
- (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.¹

In the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (UNE Remand) the Commission examined several

¹ 47 U.S.C. § 251(d)(2).

factors and by applying section 251(d)(2), it identified seven network elements without which requesting carriers were impaired:

- (1) loops, including high-capacity lines, dark fiber, line conditioning and some inside wire;
- (2) subloops;
- (3) network interface devices;
- (4) local circuit switching;
- (5) interoffice transmission facilities, including dedicated transport from DS1 to OC96 capacity levels and such higher capacities as evolve over time, dark fiber and shared transport;
- (6) signaling networks and call-related databases; and
- (7) operations support systems (OSS).²

In a separate order, the Commission added the high frequency portion of the loop.³ In the UNE Remand Order, the Commission determined that section 251(d)(2) contemplates more than just an initial finding that a network element satisfies the “necessary” or “impair” standard before leading to designation as a UNE. The Commission identified five other factors that further the goals of the Act: “rapid introduction of competition in all markets; promotion of facilities-based competition, investment, and innovation; reduced regulation; market certainty; and administrative practicality.”⁴

By this NPRM, the Commission seeks comment on its previous determinations for establishing UNEs; whether the list is complete; and, how to promote the advanced services mandate of Section 706 of the Act. Section 706 provides the following direction to the Commission:

Encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by

² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*. Third Report and Order and Fourth Further Notice of Proposed Rulemaking. CC Docket No. 96-98. paras. 162-437.

³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*. Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98.

⁴ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*. Third Report and Order and Fourth Further Notice of Proposed Rulemaking. CC Docket No. 96-98. paras. 101-116.

utilizing...price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.⁵

For purposes of the NPRM, “advanced telecommunications capability” is defined by the Commission “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology.”⁶ Broadband has been used to mean “sufficient capacity to transport large amounts of information.”⁷ Parties have argued, both before the Commission and at state levels, that imposing unbundling requirements on incumbent local exchange carriers (ILECs) may deter investment in infrastructure by both the ILEC and competitive local exchange carriers (CLECs).

As ILECs seek to operate under price cap regulation and regional Bell Operating Companies (RBOCs) achieve interLATA authority under Section 271 of the Act, it is apparent that certain markets are now open to competition. However, the makeup of this competition is worthy of examination in considering the future of the Commission’s unbundling rules.

Missouri has three carriers subject to price cap regulation under Section 392.245 of the revised Missouri statutes. Under Missouri statutes, an ILEC is subject to price cap regulation when an alternative local exchange telecommunications carrier has been certificated to provide basic local telecommunications services, and is providing such service, in any part of the ILECs

⁵ Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S. C. § 157 (47 U.S. C. § 157 nt).

⁶ Id § 157 nt.

⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*. Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98. para. 1, n.2.

service area. These carriers cover approximately 91 percent of the access lines in Missouri. Another 37 ILECs comprise the remaining lines in Missouri.

There are 83 CLECs certificated to provide service in Missouri. For these comments, “certificated” is defined as having received approval from the MoPSC to offer service, having approved tariffs on file with the MoPSC and having negotiated and approved interconnection agreements on file with the MoPSC. Of these carriers, 34 are certificated as facilities-based providers. Thirty-two of the certificated carriers provide prepaid service only. Of the certificated carriers, 74 are certificated to provide service in SWBT territory, 18 are certificated to provide service in Verizon Midwest territory, 18 are certificated to provide service in CenturyTel territory and 15 are certificated to provide service in Sprint Missouri, Inc. territory. Two CLECs are certificated to provide pre-paid local service in small ILEC exchanges in Missouri. In SWBT’s Section 271 Missouri proceeding, the MoPSC found that CLECs serve approximately 12 percent of the access lines across SWBT’s basic local service area.

In response to Southwestern Bell Telephone Company’s (SWBT) request to have its services classified in Missouri as competitive, the MoPSC undertook an analysis of the status of competition in SWBT’s exchanges. To complete this analysis, the MoPSC not only had to consider whether competition exists but also had to find that *effective* competition exists. Section 386.020(13) of the revised Missouri statutes identifies the following factors to be considered when determining effective competition:

- (a) The extent to which services are available from alternative providers in the relevant market;
- (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

- (c) The extent to which the purposes and policies of Chapter 392 RSMo, including reasonableness of rates, as set out in Section 392.185 RSMo are being advanced;
- (d) Existing economic or regulatory barriers to entry; and
- (e) Any other factors deemed relevant by the MoPSC and necessary to implement the purposes and policies of Chapter 392 RSMo.

The MoPSC determined that although CLECs are providing service in Missouri, these competitors are not providing service equally throughout all SWBT exchanges. It also determined that the majority of the competitors' services were not CLEC-owned facilities-based service.⁸ While the MoPSC only completed a review of that status of competition in SWBT exchanges, this information is relevant to competition in general.

The Commission recently released its report on new entrant switched access lines and local telephone service competition in the United States. According to the report, CLECs had 17.3 million (or 9 percent) of the approximately 192 million nationwide switched access lines in service at the end of June 2001. This represents a growth of 1.3 percent from the previous year. Approximately one third of the CLEC switched access lines are over CLEC-owned local loop facilities and 44 percent over acquired UNE loops. ILECs reported providing almost 8 million UNE loops to other carriers, of which about 3.2 million were provided without switching and about 4.8 million were provided with switching. The report indicates at least one CLEC was providing local telephone service to end users in 60 percent of the nation's zip codes as of June 2001.⁹

⁸ *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, TO-2001-467 Report & Order, Issued December 27, 20001, page 14.

⁹ Summary of FCC Form 477 filings made by qualifying providers on September 1, 2001, and reflecting data as of June 30, 2001. Summary of Telecommunications Reporting Worksheet (FCC Form 499-A) reflecting data for the year 2000.

In its investigation into the status of competition in SWBT exchanges, the MoPSC considered whether alternative services such as those provided by wireless providers, cable TV providers, Internet service providers, fixed satellite providers, and customer premises equipment manufacturers constitute “equivalent or substitutable service” as required by Missouri statutes. The MoPSC found it appropriate to consider such services as relevant factors to a review of the status of effective competition. However, the MoPSC also found that for most SWBT services, “very little evidence was presented to persuade the Commission that alternative providers are actually offering services that are functionally equivalent or substitutable for Southwestern Bell’s services at comparable rates, terms and conditions.”¹⁰

Finally, the MoPSC considered evidence as to the existing economic or regulatory barriers to entry. The MoPSC concluded the availability of resale and unbundled network elements provide effective ways for CLECs to enter the market with little capital investment and that regulatory barriers are disappearing. CLECs may also experience barriers to entry due to current economic conditions, including limited access to capital and the current retail rate structures of ILECs. In its Findings of Fact, the MoPSC found that SWBT has experienced a substantial market share loss for core business services in the St. Louis and Kansas City exchanges. Much of this loss was to CLECs that own their own facilities, specifically those with fiber networks within 1000 feet of a significant quantity of business and residential customers.¹¹ The Commission also found that a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned cable telephony facilities in the SWBT exchanges of St. Charles and Harvester.

¹⁰ Id page 18.

¹¹ Id page 22.

While the status of competition investigation was limited to SWBT exchanges, these exchanges cover approximately 27 percent of the Missouri exchanges, which includes nearly all the major urban areas. By extrapolating the numbers, we can create an estimate to infer that the SWBT exchanges represent a valid statistical indication of the competition in Missouri. Over five years have elapsed since the passage of the Telecommunications Act and three years have passed since release of the UNE Remand Order establishing the various UNEs. While it is clear that competition exists, it is equally clear that competition has not met the market opening expectations of the Act. Competition must not only exist, but should impose credible pricing constraints and, of course, must be sustainable. Therefore, the MoPSC contends it is premature to eliminate the unbundling requirements established pursuant to the UNE Remand Order.

Having established arguments for maintaining unbundling requirements, the MoPSC now offers comments addressing the specific unbundling requirements and the list of UNEs as currently established. The Commission asks, “Should we exempt from an unbundling obligation any facilities that an incumbent LEC constructs after a set point in time?” Section 251(c)(3) defines unbundled access as,

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory...An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

To allow CLECs to compete, ILECs must continue to provide nondiscriminatory access to UNEs. As ILECs construct additional facilities, CLECs should be allowed access to those UNEs

to promote continued competition with incumbents and to be consistent with the definition of “unbundled access” in the Act.

The Commission asks if some unbundling obligations should categorically be limited to certain types of facilities, services or categories of services, or types of customers a requesting carrier seeks to serve. For instance, the Commission asks if it should remove fiber loops from the unbundling list while keeping copper loops on that list. Similarly, the Commission asks if the unbundling requirements should be limited to specific services such as telephone exchange service, exchange access service or CMRS. Again, the Act requires nondiscriminatory access to elements for the provisioning of telecommunications service. To effectively compete, competitors must be allowed to provide ubiquitously, substitutable telecommunications services to the customer base of the incumbent provider on a technology neutral basis. True competition must evolve into a facilities-based network or a combination of facilities and UNE-P. Limiting the unbundling obligations could have the effect of impeding competition before it has a chance to effectively and efficiently substitute for regulation as envisioned by the Act.

Having established that the Act requires nondiscriminatory access to elements for the provisioning of telecommunications services utilizing the same technology, telecommunications services and customer base as the ILEC, the MoPSC respectfully suggests that in order for competition to progress from its current state and also meet Section 706 requirements, the Commission use this opportunity to consider the unbundling of advanced service offerings such as Project Pronto, which is being deployed by SBC in some of its territories. The Project Pronto architecture, described as an overlay to the existing copper network, will increase ADSL capability from the existing 40 percent to approximately 80 percent of all SBC end user locations. CLECs argue that the lack of unbundled access to the Project Pronto architecture

places them at a competitive disadvantage to the ILEC, while SBC argues that unbundling Project Pronto is technically infeasible. Similar arguments are made as to unbundling requirements for splitter-ownership in a line splitting situation. Since the Commission has expressed an interest in not only advancing competition in the local exchange market, but also advancing the goals of the Act by achieving competition in all markets, it is imperative that the Commission consider, as part of its triennial UNE review, the necessity for unbundling obligations of technologies that will support growth of broadband or advanced services competition.

In order to promote facilities-based competition, competition in services that are offered either exclusively over a carriers own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the purchase of UNEs or resale of the telecommunications services of another carrier, the Commission should continue on the path as established in the UNE Remand Order. Elements that are currently unbundled should remain on the national list for unbundled network elements. In addition, the Commission should initiate a review to determine the benefits, if any, of increasing unbundling requirements to include such things as technologies to promote advanced services such as SBC's Project Pronto architecture and line splitting provisions.

Since competition as anticipated by the Act has yet to mature, the MoPSC suggests that the Commission establish another triennial review of existing UNEs and any new UNEs established as a result of this triennial review. Until such time as consumers nationwide, whether rural or urban, can experience true competition, it is premature to remove unbundling obligations from incumbent local exchange carriers.

Respectfully submitted,

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